84-84

No.

IN THE

Supreme Court of the United States

October Term, 1984

CAROL A. CRANE, Individually and as Administratrix of the Goods, Chattels and Credits which were of PETER A. CRANE, Deceased,

Petitioner,

v.

CONSOLIDATED RAIL CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LAWRENCE T. D'ALOISE, JR.
For the Firm of CLARK, GAGLIARDI & MILLER, P.C.
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The Inns of Court
99 Court Street
White Plains, NY 10601
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QUESTIONS PRESENTED.

1. Did the court of appeals exceed its authority under the Constitution, statutes and common law in reversing the discretionary decision of the trial judge who partially set aside the jury verdict as against the weight of the evidence?

2. Did the court of appeals usurp the discretionary prerogative of the trial judge and exceed its authority in reversing the discretionary decision of the trial judge who ordered a partial new trial because of errors of law and fact?

3. In reversing the district judge's direction of a new trial on damages did the court of appeals ignore the trial judge's charge on damages which was confusing to the jury and not in accord with

precedent of this court as to the manner of discounting lost earnings to present value?

PARTIES BELOW.

The parties to this proceeding are listed in the caption of the case. Petitioner is not aware of the identities of the parents, subsidiaries and affiliates of the defendant-respondent, if any.

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No.

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SUPREME COURT OF THE UNITED STATES

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CAROL A. CRANE, Individually and as Administratrix of the Goods, Chattels and Credits which were of Peter A. Crane, Deceased,

Petitioner,

v.

CONSOLIDATED RAIL CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

- -X

PETITION FOR A WRIT OF CERTIORARI.

Petitioner Carol A. Crane, Individually and as Administratrix of the Goods, Chattels and Credits which were of Peter

A. Crane, Deceased, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 30, 1984. Petitioner's petition for rehearing *en banc* was denied by the said Court on May 11, 1984.

OPINIONS BELOW.

The order of the court of appeals denying petitioner's petition for hearing *en banc* appears in the appendix at A1. No opinion was issued with that order.

The judgment of the United States Court of Appeals for the Second Circuit appears in the appendix at A3. The decision of that court (731 F2d 1042) upon which the judgment was entered appears in the appendix at A5.

The opinion of the district court granting the petitioner a new trial on

contributory negligence and damages appears in the appendix at A27.

JURISDICTION.

The judgment of the court of appeals was entered on March 30, 1984. The order of the court of appeals denying petitioner's motion for rehearing *en banc* was filed on May 11, 1984. The jurisdiction of this Court is invoked under 28 USC §1254(1).

STATUTES AND RULES.

Rule 50 of the Federal Rules of Civil Procedure appears in the appendix at A37.

Rule 59 of the Federal Rules of Civil Procedure appears in the appendix at A40.

The Seventh Amendment to the Constitution states as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars,

> the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

28 USC 2105 states as follows:

> "There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction."

PRELIMINARY STATEMENT.

There have been two trials in the district court. In the first trial the defendant's negligence was established but the jury found plaintiff's decedent 50% negligent and awarded gross damages of $425,000. District Judge Motley set aside the verdict on contributory negligence and damages, and directed a new trial.

After the second trial in which the jury awarded damages of $1.75 million, the

defendant appealed. The United States Court of Appeals for the Second Circuit affirmed the trial court's direction of a new trial on contributory negligence, but reversed the court's direction of a new trial on damages and reinstated the first jury's damage award. Plaintiff-petitioner seeks certiorari from this Court to review the Second Circuit's decision.

STATEMENT OF THE CASE.

A. The Facts

In this case arising under the Federal Employers Liability Act (FELA), the plaintiff's decedent, a Conrail employee, was killed as a result of the negligence of the railroad. The accident occurred at the defendant's Scarborough station

about thirty miles north of New York City (219a).[1] The decedent was a member of a track repair crew. At the time of the accident the crew under the direction of foreman Conway was making repairs to the wooden commuter crosswalk over the tracks (151a-152a, 204a-206a, 235a, 275a, 310a). The repair required cutting wood planks to replace the rotten planks in the walkway (311a-313a). As decedent, aided by a co-worker and the foreman, was cutting a piece of wood with a chainsaw within the safety area of the station platform, a train came along and apparently struck another co-worker who was sitting in the track area who, in turn, struck the decedent thrusting him into the path of the train (212a, 223a-225a, 318a, 322a).

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1. References preceded by "A" are to the appendix to this brief. References followed by "a" are to the appendix before the circuit court.

The proof at the trial demonstrated that the foreman in charge of the job did not provide proper safety precautions as required by Conrail's own safety rules. Although one advance watchman with only an airhorn was assigned by the foreman, he was situated too far away so that his horn was not audible over the noise of the chain-saw (248a). Conrail's rules required that additional watchmen equipped with horns, white discs and red flags were required when noisy machinery was being used (235a-237a). The railroad's own investigators concluded after the accident that the "foreman did not take every precaution to protect men in his charge by providing additional watchmen." (Plaintiff's Exhibit "41"). The proof also showed that the engineer of the train should have been able to stop before reaching the work area had he acted prudently under the circumstances.

The decedent was thirty-two years of age and left surviving a thirty-three year old wife and a four year old son. The decedent was a hard-working, ambitious and expert carpenter who was recognized by co-workers and family alike to be an exceptional person. By the time of his death he had already been president of his local union, had been asked to run for public office in his home town, and was a champion athlete. He was described by witnesses as a family man, and a devoted and loving father. He was so revered in the community that after his death a fountain was dedicated in his memory.

In the year he died, decedent's earnings from the railroad were $23,500 (822a). His average annual real increase of income above inflation for the ten years prior to his death was 4.9% per annum (824a, 852a-854a). Based upon these facts plaintiff's

economist at the second trial calculated the survivors' discounted economic loss including future earnings, fringe benefits and services around the home to be over $2.8 million dollars (844a).

B. The Proceedings Below

After the first trial, the plaintiff-petitioner moved to set aside the verdict on contributory negligence and damages as against the weight of the evidence, and because of errors in the charge on the discount rate, among other things. The trial judge set aside the verdict on both issues finding that "the jury has reached a seriously erroneous result" (A33). On contributory negligence, the district judge determined that "(t)he finding of fifty percent contributory negligence is simply not supported by the evidence in this case" (A33), and that "it is inconceivable that a jury

which properly understood the law it was to apply could have found Crane to have been as negligent as all the other workers combined . . ." (A34-35). On damages, the trial judge found that "the finding of damages and that of contributory negligence are sufficiently related that the jury's damage finding may also have been tainted by the misconception of the law and the evidence" (A36).

During the second trial the defendant railroad chose not to relitigate the contributory negligence issue. That trial was thus confined to the issue of damages alone. The jury in that trial found in favor of the plaintiff in the amount of 1.75 million dollars.

The railroad appealed to the United States Court of Appeals for the Second Circuit contesting the setting aside of the jury's finding on contributory negligence

and damages at the first trial, and the amount of the award at the second trial.

The Second Circuit Court of Appeals affirmed the District Court's setting aside the first jury's verdict on contributory negligence noting the "primacy of an employer's duty to furnish employees with a safe place to work . . . If Conrail had greater responsibilities than Crane, as it did, the Judge had a rational basis for thinking that an allocation of 50% of the total fault to him was 'seriously erroneous'" (A19-20).

However, the Second Circuit reversed the district court's grant of a new trial on damages and reinstated the award of the first jury. In so doing, the Second Circuit ignored the clear line of precedent in this court and in the Second Circuit that a circuit court has not authority to review a district court's order setting

aside a verdict as against the weight of evidence. Further, the Second Circuit usurped the authority of the trial court and substituted its judgment for that of the trial judge in reversing her finding that the jury's verdict on contributory negligence and damages were so related as to require a new trial on both issues. In addition, in reinstating the damages award of the first jury the Second Circuit minimized the impact of the district court's charge to the jury on the manner of discounting which did not follow the guidelines set by this Court in *Jones & Laughlin Steel Corp. v. Pfeifer*, U.S. , 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), and certainly hopelessly confused the jury as to the manner of discounting.

REASONS FOR GRANTING THE WRIT.

POINT I.

UNDER THE CONSTITUTION, FEDERAL STATUTES AND PRECEDENT OF THIS COURT A CIRCUIT COURT OF APPEALS HAS NO POWER TO REVIEW A DISTRICT COURT'S ACT OF GRANTING A NEW TRIAL ON THE WEIGHT OF THE EVIDENCE. THE SECOND CIRCUIT EXCEEDED ITS AUTHORITY IN REVERSING THE DISTRICT JUDGE'S GRANT OF A NEW TRIAL ON DAMAGES BECAUSE OF ERRORS OF FACT.

Section 22 of the Judiciary Act of 1789 provided that there should be no reversal in the circuit courts or the Supreme Court upon a writ of error for any error of fact (1 Stat. 84-85).[2] The Seventh Amendment to the Constitution provides that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

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2. The district court has been authorized by statute to set aside a jury's finding of fact FRCP 59[a]).

In *Fairmount Glass Works v. Cub Fork Coal Company*, 287 U.S. 474, 53 S.Ct. 252, 77 L.Ed. 439 (1933), this Court declared that the "rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact . . . precludes likewise a review of such action by a circuit court of appeals" (77 L.Ed. at 443; see also, *Holmgren v. United States*, 217 U.S. 509, 30 S.Ct. 588, 54 L.Ed. 861 [1910]).[3]

In 1953, Judge Hand of the United States Court of Apppals for the Second Circuit in *Portman v. American Home Products*

3. In *Fairmount*, this Court defined the only circumstances in which an appeals court could review the action of the trial court on a motion for a new trial based upon the weight of the evidence to be when the trial court excluded from consideration matters appropriate to the decision, or when the trial court mistakenly believed it had no jurisdiction to entertain the motion or to grant it on the ground advanced (77 L.Ed. at 444). None of those circumstances are present here.

Corp., 201 F.2d 847 cited this Court's holding in *Fairmount Glass Works* in support of that court's unanimous determination that a trial court's decision to grant or deny a motion to set aside a verdict on the ground that it is against the weight of the evidence is not reviewable by a circuit court.

The present counterpart of the Section 22 of the Judiciary Act (28 USC 2105) does not expressly carry forward the prohibition in Section 22 against a circuit court's reviewing a new trial determination for error of fact. The revisers notes to Section 2105 do not disclose any intention to broaden the scope of appellate review to such discretionary decisions of a district court. Prof. Moore in his treatise has commented that in his view, the circuit court does not have the power to review district court determinations

on motions for a new trial on errors of fact notwithstanding the present language of 28 USC 2105 (6A Moore's Federal Practice §59.05[2] p. 59-43). He suggests that appellate courts may not exercise such power "absent clear statutory authorization" (*Id.* at 59-44).

In point of fact, up until this case the Second Circuit has adhered to the view espoused by Judge Hand in *Portman, supra.* (See, *Compton v. Luckenbach Overseas Corp.*, 425 F.2d 1130 [2nd Cir. 1970], "(a)ppellant is apparently arguing that we may set aside a determination by the trial judge that a verdict was not against the weight of the evidence, a proposition not accepted in this circuit" (at p. 1132, see also n. 2 at 1132); and *Mallis v. Bankers Trust Co.*, 717 F.2d 683 [2nd Cir. 1983] at 690-691, n. 11 in which the Second Circuit, citing *Portman*, recognized that there are substantial doubts

as to its power to review a trial judge's decision on a new trial motion based on weight of the evidence except when the trial court fails to exercise its discretion as a result of legal error).

In the case at bar, the district court judge found the jury's verdict on contributory negligence to be against the weight of the evidence. "The finding of fifty percent contributory negligence is simply not supported by the evidence in this case" (A33). The trial judge determined that the jury's finding on damages was tainted by the jury's misconception of the law and the evidence.[4] Thus, insofar as the district court set aside the jury's verdict on damages as against the weight

4. Although it is not clear from her opinion, petitioner suggests that the trial judge was referring to her confusing charge on the discount rate when she determined that the jury misconceived the law on damages. (See Point III, *infra*).

of the evidence, its decision was not reviewable by the Second Circuit.

The Second Circuit, nonetheless, rereversed the trial court's grant of a new trial on damages. Conceding that the district judge set aside the verdict as against the weight of the evidence (A13,15) the circuit court, relying on the Third Circuit decision in *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, *cert. denied* 364 U.S. 835 (1960), announced "the need of particularly close appellate scrutiny where the trial judge grants a new trial solely because the judge regards the verdict as against the weight of the evidence . . ." (A17). Relying on the dissenting opinion in *Lind*, the circuit court applied a test of "(w)hether there can have been any basis in reason for the trial judge's conclusion as to the weight of the evidence and the

injustice of the verdict" in reversing the trial court (A17).

This decision along with the Third Circuit's decision in *Lind* are clear departures from the precedent cited hereinbefore. It is significant that the majority and the dissenting judge in *Lind* cited no authority whatsoever for their conclusions that a circuit court has authority to review the grant of a new trial for error of fact, and the *only* authority which the Second Circuit in this case cited on the point was the *Lind* decision.

Petitioner contends respectfully that the Second Circuit has usurped the trial court's sole province to grant a new trial on errors of fact without statutory authorization and in violation of the limitations on its power to review implicit in 28 USC 2105 and the Seventh Amendment to the Constitution. Since the very authority

of a circuit court under the Constitution and controlling federal statutes to review a district court's discretionary act of granting a new trial for errors of fact is at stake, petitioner respectfully submits that a special and important reason exists for this Court to grant certiorari to review the Second Circuit's decision. In view of the clear and significant departure of this decision from prior decisions of this and other courts, it is necessary for this Court to consider the scope of the circuit court's authority to review, if any, under the circumstances.

POINT II.

THE CIRCUIT COURT DEVIATED FROM PRECEDENT IN THIS COURT AND OTHER CIRCUITS IN REVERSING THE TRIAL COURT'S GRANT OF A NEW TRIAL TO THE PLAINTIFF ON DAMAGES BECAUSE OF ERRORS OF LAW.

The trial court granted a new trial on damages because of the jury's "misconception

of the law and the facts." The circuit court had no power to review the trial court's determination based on errors of fact (Point I, *supra*). In addition, although the circuit court does have limited authority to review the district court's decision insofar as it set aside the jury's verdict for errors of law, the Second Circuit usurped the trial judge's prerogative and substituted its judgment instead in violation of authority in this Court and other circuits as to the extent of a circuit court's power to review such decisions.

"(T)he granting or refusing of a motion for a new trial is a matter within the discretion of the trial court." (*Fairmount Glass Works v. Cub Fork Coal Company*, 287 US 474, 482, 53 S.Ct. 252, 77 L.Ed. 439, 444 [1933]). "The authority to grant a new trial . . . is confided almost entirely to

the exercise of discretion on the part of the trial court." (*Allied Chemical Corp. v. Daiflon, Inc.*, 449 US 33, 36, 101 S.Ct. 188, 66 L.Ed.2d 193, 197 [1980]).

The standard of a trial court's review of a jury determination most often cited in the cases and approved by the Second Circuit in *Bevevino v. Saydjari*, 574 F.2d 676 (1978) is set forth in 6A Moore's Federal Practice Section 59.08[5], at 59-147 to 59-150 (2nd Edition, 1983, footnotes omitted) as follows:

> "The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has not been, then it is

> his duty to set the verdict aside; otherwise not *(sic)*."

In contrast, the authority of a circuit court to review a trial court's exercise of discretion in granting or denying a new trial based on errors of law is limited in scope. Up to the present case, the Second Circuit rule has been that "the granting or refusing of a new trial is a matter resting within the discretion of the trial court and will be reviewed only for a *clear* abuse of discretion" (*Campbell v. American Foreign S.S. Corp.*, 116 F.2d 926, 928 [2nd Cir.], *cert. denied* 313 U.S. 573 [1941], emphasis supplied). Other circuits are in accord (see, e.g. *United States v. Horton*, 622 F.2d 144 [5th Cir. 1980]; *Air Line Stewards and Stewardesses Association, Local 550 v. Trans World Airlines, Inc.*, 630 F. 2d 1164 [7th Cir. 1980]; *Pue v. Sillas*,

632 F.2d 74 [9th Cir., 1980]). Prof Moore has commented that "under unusual or special circumstances the trial court's action may constitute an abuse of discretion and be reviewable; *but rarely can this be shown*" (*supra* at §59.08[5], at 59-152; emphasis supplied).

This Court has recognized that a trial court is in a peculiar position to determine whether a new trial is warranted because the trial judge

> ". . . can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted . . . calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart . . .

> Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to review the proceedings in a perspective peculiarly available to him alone. He is thus afforded a last chance to correct his own errors without the delay, expense or other hardship of an appeal" (*Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216, 67 S.Ct. 752, 91 L.Ed. 849, 852 [1947]).

Thus, when a circuit court must determine whether there has been a clear abuse of discretion in directing a new trial, extreme deference must be granted to the trial judge who had the opportunity to observe the witnesses and to consider the evidence in the context of a "living trial rather than upon a cold record" (*United States v. Horton*, 622 F. 2d 144, 147 [5th Cir., 1980]).

The Second Circuit did not accord the trial court such deference here. In

reversing, the Court of Appeals stated that "the memorandum opinion of the district judge . . . casts little light on why a retrial of the damages issue was thought to be necessary" (A23), and that "we find no adequate basis in the record or in the judge's memorandum opinion for her directing the issue of damages to be retried simply because the jury had assessed too large a degree of fault against Crane" (A24). Thus, the essence of the circuit court's decision is that the jury's decisions on contributory negligence and damages were separate and distinct so that an error on one (conceded by the circuit court on contributory negligence) in affirming the direction of a new trial would not influence the verdict on the other.

With due respect, the circuit court was in no position to make such an arbitrary finding. The trial judge, who saw and heard the witnesses, observed the jury,

and had a feel of the case which the transcript could not impart, determined that the jury's finding on damages and on contributory negligence were sufficiently related notwithstanding the fact that there were special verdicts on each of the issues. That finding cannot be ignored, particularly in view of decisions in this Court and other circuits on the point. This Court has held that

> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. (*Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500, 51 S.Ct. 513, 75 L.Ed. 1188, 1191 [1931]).

The Third Circuit has decided that

> "A jury which is prejudiced with respect to its finding of liability is not likely to be free from prejudice in awarding

> damages. Because there is substantial probability that the error which affected the liability verdict also affected the determination of damages, the new trial must deal with both liability and damages (*Draper v. Airco, Inc.*, 580 F.2d 91, 97 [1978]).

Also, the Third Circuit has held that there should be a retrial on all issues when error is determined with respect to one unless "it is plain that the error which has crept into one element of the verdict did not in any way affect the determination of any other issue (*Vizzini v. Ford Motor Company*, 569 F.2d 754, 760 [1977], quoting *Romer v. Baldwin*, 317 F.2d 919, 922-23 [3rd Cir.] *Reh'g Denied* [1963]; see also, *Thompson v. Camp*, 167 F.2d 733 [6th Cir.], *cert. denied* 335 US 824 [1948]). The Eighth Circuit view is that "when the error misled the jury or had a probable effect on its verdict, reversal and a new trial are

appropriate" (*E.I. du Pont De Nemours & Co. v. Berkley & Co., Inc.*, 620 F.2d 1247, 1257 *Reh'g and Reh'g En Banc Denied* [1980]).

In this case the Second Circuit determined that "something more is required to upset a verdict than the conclusory language with respect to 'taint' used by the district judge" (A). The Tenth Circuit, in language close to that used by the trial judge here, has granted a new trial on all issues "since we cannot say that the errors committed at the first trial on the issue of liability may not have tainted the jury's determination of damages" (*Martinez v. Union Pacific R.R. Co.*, 714 F.2d 1028, 1034 [1983]). In *Vizzini v. Ford Motor Company, supra*, the Third Circuit granted a new trial on liability and damages even though there was a bifurcated trial, and the jury, after

finding liability, could not agree on damages. Although there was no direct evidence that the jury's inability to agree on damages influenced its determination on liability, nonetheless the Court of Appeals directed a new trial on all issues. Such a result, bolstered by District Judge Motley's determination that the jury's error affected both contributory negligence and damages, should obtain here.

In sum, the Second Circuit has broken with tradition and precedent by usurping the trial court's function and discretionary prerogative to grant a new trial on both issues. Petitioner submits respectfully that in a case such as this where the jury clearly erred in its determination on one issue, fundamental justice requires, and precedent supports, that a circuit court may not substitute its judgment for that of the trial judge, who was in an

infinitely better position to judge the extent to which the clearly erroneous view of the jury on contributory negligence affected the jury's decision on damages. Since in this case the circuit court has assumed unto itself the primal authority accorded a trial judge in determining whether a verdict should be set aside, petitioner respectfully contends that this Court should grant certiorari to review the actions of the Second Circuit in this regard.

POINT III.

IN REINSTATING THE DAMAGES AWARD OF THE FIRST JURY THE CIRCUIT COURT IGNORED THE FACT THAT THE DISTRICT COURT'S CHARGE TO THE JURY ON THE MANNER OF DISCOUNTING DID NOT FOLLOW THE GUIDELINES SET BY THIS COURT IN *JONES & LAUGHLIN STEEL CORP. v. PFEIFER*, U.S. , 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983).

In *Jones & Laughlin Steel Corp. v. Pfeifer*, U.S. , 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), this Court determined

that the calculation of lost future income involves, essentially, the estimating of the stream of income which will be lost, and discounting that amount to present value by contrasting interest and inflation rates (103 S.Ct. at 2550; 76 L.Ed. at 782-784).

At the first trial the defendant's economist, Dr. Staller, based his calculations as to lost earnings solely on statistics of the Railroad Retirement Board which included the inflation factor of 4 to 6.1% (540a). After determining gross lost wages to age of retirement, the defense economist discounted at 12%, his assumption as to the interest rate on municipal bonds. Based on these assumptions, Dr. Staller calculated the present value of total future lost earnings for this 32 year old decedent earning more than $23,500 in the year of his death to be $247,000 (A).

On cross-examination, Dr. Staller conceded that decedent's earnings for the several years prior to his death increased an average of 10% per year (513a-514a); that treasury notes, a safe investment, were earning interest of 7.75% on the date he testified (521a); and that inflation for the four or five years prior to trial may have averaged 11 or 12% per year (540a). Based upon these assumptions, the economist testified that discounted loss of earnings was $868,000 (538a).

In her charge on discounting to present value, the trial judge instructed the jury to determine the future loss of income, and to deduct therefrom the interest rate which the jury determined the plaintiff could have expected to receive. Although plaintiff's counsel excepted to the charge because the jury was not told to contrast the interest rate with the rate

of inflation, the court refused to recharge the jury on the point.[5]

However, when the jury during its deliberations questioned the court concerning the rate of discount, the district judge gave the jury a table showing a discount rate of 2%, and charged the jury "I suggest you use a 2% rate with respect to any future award which you discount to its present value" (720a). Not only did this recharge surely hopelessly confuse the jury which originally had been told that it should determine the discount rate on its own, but, more significantly, in suggesting 2% the court blunted the effect of plaintiff's model developed on cross-examination which would have allowed the jury to consider dis-

5. The Second Circuit found that the failure of the District Judge to include a reference to inflation in her charge did not amount to reversible error because the economist's calculations of lost earnings under both the plaintiff's and the defendant's model took inflation into consideration (A26).

count rates more favorable to the plaintiff including a negative discount rate.

Petitioner contends most respectfully that in charging 2% in light of the evidence developed on behalf of plaintiff on cross-examination, the trial court ignored the entire thrust of the holding in *Jones & Laughlin Steel Corp. v. Pfeifer*, U.S. , 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983) in which this Court explicitly determined that it would not impose arbitrary discount rates on unwilling litigants "for we have not been given sufficient data to judge how closely the national patterns of wage growth are likely to reflect the patterns within any given industry" (76 L.Ed.2d at 792).

Thus, in this case where there was specific proof which would support discount rates other than 2%, the trial judge arbitrarily imposed a discount rate upon the

jury. The rate chosen by the court was disadvantageous to the plaintiff whose model assumed a rate of inflation higher than the rate of return.[6] The Second Circuit found no error in the Court's suggestion (A26, n. 7). Petitioner urges respectfully that the charge affirmed by the circuit court is directly in contravention to this Court's holding in *Jones & Laughlin Steel Corp. v. Pfeifer, supra*, and certiorari to review ought to be granted under the circumstances.

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6. Plaintiff's economist at the second trial, Dr. Kirshner, testified that the rate of inflation for the ten years preceeding the time of the trial exceeded the rate of return on safe investments such as short-term high grade municipals by 2.5% (839a, 923a-924a, 928a). In the *Pfeifer* Case, this Court acknowledged that there are sound economic arguments for discount rates below 1 to 3%, and even for negative discount rates (76 L.Ed. 2d at 791; *Id.* n. 31).

CONCLUSION.

For the reasons set forth above, petitioner respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX.

ORDER OF UNITED STATES COURT OF APPEALS, SECOND CIRCUIT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 11th day of May, one thousand nine hundred and eighty-four.

No. 83-7459

CAROL A. CRANE, individually and as Administratrix of the Goods, Chattels and Credits which were of Peter A. Crane, deceased,

Plaintiff-Appellee,

v.

CONSOLIDATED RAIL CORP.,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard *en banc* having filed herein by counsel

for the plaintiff-appellee. Carol A. Crane,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing *en banc* has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

FILED: MAY 11, 1984
Elaine B. Goldsmith
Clerk
UNITED STATES COURT OF
APPEALS, SECOND CIRCUIT

JUDGMENT OF UNITED STATES COURT OF APPEALS, SECOND CIRCUIT.

UNITED STATES COURT OF APPEALS

For The

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of March, one thousand nine hundred and eighty-four.

PRESENT: HON. HENRY P. FRIENDLY
HON. WALTER R. MANSFIELD
HON. AMALYA L. KEARSE
Circuit Judges.

83-7459

CAROL A. CRANE, Individually and as Administratrix of the Goods, Chattels and Credits which were of PETER A. CRANE, deceased,

Plaintiff-Appellee,

-against-

CONSOLIDATED RAIL CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part, reversed in part without costs to either party and remanded to the said district court for further proceedings in accordance with the opinion of this court.

Elaine B. Goldsmith
Clerk

By: Edward J. Guardaro
Deputy Clerk

FILED: MAR 30 1984
Elaine B. Goldsmith, Clerk
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

DECISION OF UNITED STATES COURT OF APPEALS, SECOND CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 454—August Term, 1983

(Argued: November 23, 1983 Decided: March 30, 1984)

Docket No. 83-7459

CAROL A. CRANE, Individually and as Administratrix of the Goods, Chattels and Credits which were of PETER A. CRANE, deceased,

Plaintiff-Appellee,

—against—

CONSOLIDATED RAIL CORPORATION,

Defendant-Appellant.

Before:

FRIENDLY, MANSFIELD and KEARSE,
Circuit Judges.

Appeal by defendant from a judgment of the District Court for the Southern District of New York, Constance Baker Motley, *Chief Judge*, awarding damages of

$1,750,000 in accordance with a jury verdict, in a wrongful death action under the Federal Employers' Liability Act. At a previous trial a jury had rendered a verdict for $425,000 and found that the decedent had been guilty of 50% contributory negligence, but the court had directed a new trial with respect to both contributory negligence and damages. Defendant asserts there was no sufficient basis for directing a new trial on either issue and, in the alternative, that even if a new trial on contributory negligence was properly directed, there was no justification for directing a new trial on damages. Affirmed with respect to the grant of a new trial on contributory negligence, reversed with respect to the grant of a new trial on damages.

HENRY G. MILLER, White Plains, New York (Lawrence T. D'Aloise, Clark, Gagliardi & Miller, P.C., White Plains, New York), *for Plaintiff-Appellee.*

RICHARD J. O'KEEFFE, White Plains, New York (O'Keeffee & Moloney, White Plains, New York), *for Defendant-Appellant.*

FRIENDLY, *Circuit Judge*:

This is an appeal by defendant Consolidated Rail Corporation (Conrail) from a judgment of the District Court for the Southern District of New York, after a jury

verdict in a second trial in an action under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.*, awarding damages of $1,750,000 for the wrongful death of Peter Crane, an employee of Conrail. This judgment compared with an award of $425,000, reduced by 50% for contributory negligence, awarded by a jury at the first trial. Conrail urges that the district court erred in directing a new trial at all and particularly so in directing a new trial on the issue of damages. Conrail also attacks the damages award at the second trial as excessive. Although the issues are close, we hold that directing a new trial on the issue of contributory negligence was within the court's discretion but that, on the facts here, directing that the trial encompass the issues of damages was not. We therefore do not reach the issue of excessiveness of the damages awarded at the second trial.

The First Trial

Crane's death came about as a result of impact from a Conrail train early in the afternoon of December 5, 1980. Crane was part of the carpentry work crew of Conrail's Harmon, New York station yard. Thomas Conway was foreman of the crew; the other members were Henry LeClerc, Cecil Walker and John Fatone.

During the morning of December 5 Conway learned that the cross-walks at the Scarborough Station needed repair. There are four sets of tracks at that station, tracks 1 and 3 being the northbound track with track 3 nearest to the northbound platform. That morning track 1 had been closed for repairs and all northbound trains operated over track 3. The walkway requiring repair was a wooden cross-over; the job involved cutting planks to replace the rotten planks in the walkway adjacent to track 3 near the northbound platform. To the right of the

northbound platform was a chainlink fence which separated the platform from the parking area.

Rule 3204 of Conrail's Safety Rules provides that "[f]oremen are responsible for a safe operation and must exercise every reasonable precaution to protect men in their charge", and Rule 101 of its Rules for Conducting Transportation provides that "[a]ny work on or adjacent to a track which may create a condition interfering with the safe movement of trains at normal speed or the use of equipment which may foul adjacent tracks, must not be attempted without the permission of the train dispatcher."[1] Foreman Conway made no request for such permission; although it was within the foreman's discretion to seek permission, the train dispatcher testified that if permission had been sought, he would not have granted it in view of the concentration of northbound traffic on track 3.

Rule 3204 of Conrail's Safety Rules also provides that the foreman "will assign gang watchmen when and where necessary as well as advance watchmen when needed." Conway assigned LeClerc as the watchman. Rule 3203 of the Rules requires that only qualified employees may be assigned as watchmen, and that gang watchmen must have an approved qualification card. LeClerc did not have the card, having neither attended classes nor received instructions about being a watchman, but had acted as a flagman or watchman on numerous other occasions. Although Rule 3206 of the Safety Rules provides that an advance gang watchman must have a warning whistle, a standard white disc and a red flag, LeClerc carried only an airhorn. He placed himself about 300 feet

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[1] Fouling the tracks means the placing of personnel or equipment at or near the tracks which might create a hazardous obstruction.

south of where the men were working. Shortly thereafter, a train came along on track 3. LeClerc sounded his airhorn and the men cleared the area.

When the work crew arrived at the station, it was decided that any necessary cutting of planks would be done by a hand-operated chain saw on the tailgate of a Conrail truck in the parking lot. LeClerc testified that he so understood the plan. A few pieces of lumber were cut in this manner; Crane volunteered to do the cutting since he was more experienced than Fatone with the chain saw.

Fatone testified that later "for some reason we felt that it would be better to go inside the gate off the edge of this concrete to cut this 4 by 6 because we could stand on it and one guy can cut on it; and that's what happened." App. at 314a. Crane, Conway and Fatone were all standing on the plank, with Crane closest to the track, looking away from it and operating the chain saw, which made a very loud noise.[2] According to Conway, "it appeared as though he [Crane] was just inside of the yellow line", *id.* at 224a—apparently the line beyond which passengers were not to go toward the track. Walker had been nailing some planks in the track area and was about to sit down.

Just at this time a second northbound train approached. LeClerc sounded his airhorn[3] but the noise of

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2 Safety Rule 3207 states that the use of noisy machinery may require additional gang watchmen. Rule 3208 provides that additional warning may be needed around noisy machinery. No additional watchmen or warnings were provided by Conway, even though the work involved use of a chain saw.

3 On seeing that the men were not clearing the platform, LeClerc started running to them blowing the airhorn, which he also waved over his head in an unsuccessful effort to warn the engineer. The engineer testified that if he had applied his brakes when he first saw LeClerc, the train would have stopped 500 feet before it reached the work crew. It was only when he passed LeClerc that he put on his brakes and started blowing his whistle; the latter had no effect, the whistle apparently also being drowned out by the noise of the chain saw.

the saw drowned it out. The train hit Walker's legs and either the train or Walker's body hit Crane; both were killed immediately.

Conrail's Safety Rule 3207 provides that a watchman will not place himself farther from the gang than his warning whistle will be distinctly heard, and Rule 3208 requires a watchman to warn the crew of an approaching train at least fifteen seconds before the train reaches the point of the work. A reenactment of the accident performed as part of an investigation made by Conrail's Superintendent of Safety showed that from LeClerc's position as watchman his airhorn was not audible while the men were using the chain saw. The investigators concluded that there were viollations of Conrail Safety Rules 3204 and 3207(b) "in that [the] foreman did not take every precaution to protect men in his charge by providing [an] additional watchman." Conrail Memorandum of Investigation at 2 (Dec. 6, 1980). No fault was found with respect to Crane.

With respect to damages, plaintiff's counsel did not call an economic expert at the first trial. Counsel did show that at the time of his death Crane was in excellent health and was survived by a thirty-three year old wife and four year old son to whom he was deeply devoted. He had been employed by Conrail for six years and was highly regarded by all who knew him. He had served as president of his local union. He performed carpentry and other work at his own home, took care of the household books, checks and finances, and was careful about expenses. He had dreamed of opening his own contracting business. Counsel did not, however, reduce any of this evidence to statistical form, other than presenting copies of Crane's income tax returns filed jointly with his wife for 1978, 1979 and 1980. He contented himself with

cross-examining Conrail's economic expert, Dr. Jerome Staller, with respect to the latter's figure of $284,000 present value for lost future earnings and fringe benefits, as described below, and suggesting a total award of $2,500,000 when making his summation to the jury.

Dr. Staller had estimated Crane's future earnings on the basis that Crane would remain with the railroad until age fifty-eight, and would receive the wage increases provided by contract through 1982 and other increases based on the Railroad Retirement Board's projected earnings growth "that run from [a] 7.1 percent increase [for 1983], 6.1 percent a few years after that, and then 5.735 percent [for 2000 to retirement]." App. at 492a. He testified that inflation was built into these figures. *Id.* at 540a-41a. Dr. Staller did not consider the possibilities that Crane would be promoted or might leave the railroad's employ for a higher paying job. He deducted 31.9% for taxes until 1995 and 33.1% thereafter until retirement, and assumed personal maintenance ranging from 14.9% to 25%. He selected an interest rate of 12% for the gross recovery, which was based on the average rate of return over the past year for municipal bonds, and a reinvestment rate of 6.7% for the interest earned at the 12% rate. Using these rates as the rate of discount in a "two-step process", Staller determined that the present value of Crane's future earnings was $247,204. To this amount he added $36,801 for lost fringe benefits, making a total of $284,005. He made no estimate of the claim for loss of Crane's services in the household and nurture and plaintiff's counsel did not supply one.

Plaintiff's counsel questioned several of the assumptions used in Dr. Staller's analysis and asked him to make another calculation using hypothetical figures supplied by counsel. For instance, counsel requested Staller to assume

that Crane would remain working at the railroad until age sixty-five, that he would receive annual wage increases of 10% (a figure which presumably accounted for inflation), and that the discount rate would be 7.75%, less deductions for federal taxes. *Id.* at 534a. Based on these figures, Staller calculated a present value of $782,000 for Crane's future lost earnings. Defendant's counsel moved that the court strike this calculation on the ground that the assumptions supplied by plaintiff's counsel had no support in the record and were purely speculative. The court denied the motion and allowed the jury to consider this alternative analysis when determining Crane's future lost earnings.

In answer to questions put by the court the jury found that defendant had been negligent, that plaintiff had been contributorily negligent, and that the degree of his contributory negligence was 50%. The jury answered questions on damages as stated in the margin.[4]

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[4]

Damages

1. What amount do you award the plaintiff to compensate for all financial losses suffered from the date of Mr. Crane's death to the present?

   $43,300.00

2. What amount do you award the plaintiff to compensate for future losses, that is, from today to some time in the future, based upon what you find would have been Mr. Crane's life expectancy, and discounted to its present value?

   $381,700.00

3. Subtract from the total amount of damages set forth above the amount of money which is equal to the percentage of Mr. Crane's contributory negligence, if any, and set forth in the final award.

Total Damages	$425,000.00
Subtracted by	$212,500.00
FINAL AWARD	$212,500.00

The Motion for a New Trial

Plaintiff moved to set aside the verdict and for a new trial on the grounds that the diminution of recovery by 50% as a result of Crane's contributory negligence was not supported by the evidence and that the award of damages was inadequate and resulted from an error in the charge on discounting. Chief Judge Motley granted the motion in a memorandum opinion.

The judge dealt mainly with the finding that Crane's negligence constituted 50% of the total. She began with this court's opinion in *Bevevino v. Saydjari*, 574 F.2d 676, 683-84 (2 Cir. 1978), where we approved the standard for granting new trials on the ground that the verdict was against the weight of the evidence set forth in 6A Moore's Federal Practice ¶ 59.08[5], at 59-147 to 59-150 (2d ed. 1983) (footnotes omitted):

> The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has not [sic] been then it is his duty to set the verdict aside; otherwise not.

She thought it was "quite clear that the jury has reached a seriously erroneous result." She said she had initially indicated that she would not even charge with respect to contributory negligence but had decided to include the charge "on the theory that it was conceivable, however

unlikely, that the jury might find that Crane should have protested the unsafe conditions and did not." She thought that such a finding "could in no way support a verdict of fifty percent contributory negligence, nor, indeed, anything over five percent." She pointed out that at the time of his death Crane was working with two other railroad employees and that "[i]f Crane was negligent, so were his co-workers." More important, at least in our view, were her criticisms of the foreman whose "behavior fell shockingly below the reasonable man standard." Altogether, "to allow the contributory negligence finding to stand would be a miscarriage of justice." Since, in the judge's view, allowing the finding of damages to stand but eliminating the halving for contributory negligence would result in an additur prohibited by the 5-4 decision in *Dimick v. Schiedt*, 293 U.S. 474, 486-88 (1935), which we have recently applied to a remittitur on the percentage of contributory negligence in *Akermanis v. Sea-Land Service, Inc.*, 688 F.2d 898, 902-03 (2 Cir. 1982), *cert. denied*, 103 S. Ct. 2087 (1983), a new trial on the issue of contributory negligence was required.

Turning to the issue of damages, the judge recognized that "[w]here, as here, the jury has rendered a detailed special verdict, the court may properly separate the issues of contributory negligence and damages for retrial purposes," citing *Akermanis*, *supra*, 688 F.2d at 906-07. She thought, however, that

> on the facts here, the court believes that the finding of damages and that of contributory negligence are sufficiently related that the jury's damage finding may also have been tainted by the misconception of the law and the evidence.

Accordingly she also directed a new trial on the issue of damages.

The Second Trial and the Appeal

The second trial took a surprising turn. Defendant, which had so vigorously asserted Crane's contributory negligence at the first trial, now chose not to present any evidence on the point. The court accordingly granted plaintiff's motion for a directed verdict on the issue of contributory negligence. Plaintiff who had presented no economic witness at the first trial, now called Dr. Thomas Kershner, a qualified economist, who testified to a total economic loss of $2,851,008. Defendant again called Dr. Staller to testify as an economic witness. Making several revisions of his earlier analysis, Dr. Staller calculated a total discounted present value of $418,897 for loss of future income and fringe benefits. The jury found damages of $1,750,000. Defendant's motion to set this aside as excessive was denied.

On appeal, as indicated, Conrail contends that the award of the jury in the first trial should not have been set aside; that in any event its award of damages should not have been set aside; and that the damage award at the second trial was excessive.

DISCUSSION

It is undisputed that Chief Judge Motley correctly defined the standard governing whether or not to grant a new trial on the ground that the determination that Crane's negligence constituted 50% of the total, 45 U.S.C. § 53, was against the weight of the evidence. The question is whether she applied the standard correctly—more accurately, whether her determination that the standard was met constituted an "abuse of discretion", see 6A Moore's Federal Practice, *supra*, ¶ 59.08[5], at 59-151,

59-152. Although the Moore treatise says that "rarely can this be shown", it cites several cases where appellate courts have done this. See *Indamer Corp. v. Crandon*, 217 F.2d 391 (5 Cir. 1954); *Lind v. Schenley Industries*, 278 F.2d 79 (3 Cir.) (en banc), *cert. denied*, 364 U.S. 835 (1960); *Fireman's Fund Insurance Co. v. Aalco Wrecking Co.*, 466 F.2d 179 (8 Cir. 1972), *cert. denied*, 410 U.S. 930 (1973). In the *Lind* case there were two excellent and instructive opinions by distinguished appellate judges. Chief Judge Biggs, writing for a large majority, had this to say, 278 F.2d at 90:

> But where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial.

Judge Hastie wrote in a dissent, joined by Judge Kalodner, *id.* at 91:

> This traditional conception of the role of the trial judge has provided the one important limitation on

> the power of the jury to make an unimpeachable decision on the facts, even where the evidence is conflicting. The judge may not substitute the verdict he would have rendered on the evidence for that actually rendered by the jury. But he may avoid what in his professionally trained and experienced judgment is an unjust verdict by vacating it and causing the matter to be tried again by a second jury. Thus, the essential institution of jury trial is respected and an expedient middle ground is maintained between the absence of any control over a jury's verdict on conflicting evidence, on the one hand, and judicial usurpation of the fact finding function, on the other.
>
> Under this scheme the only function of a reviewing court, once the trial court has ordered a new trial, is to see whether there can have been any basis in reason for the trial judge's conclusion as to the weight of the evidence and the injustice of the verdict.

Drawing on both opinions we agree with Chief Judge Biggs as to the need of particularly close appellate scrutiny where the trial judge grants a new trial solely because the judge regards the verdict as against the weight of the evidence but with Judge Hastie that the test is "whether there can have been any basis in reason for the trial judge's conclusion as to the weight of the evidence and the injustice of the verdict."

We do not find the verdict so irrational as did the district judge. Cutting the last piece of timber on a platform close to the northbound track, with the chain saw making a noise that obliterated the sound of the watchman's horn, should have been perceived by an experienced workman like Crane to be a dangerous practice. An employee should exercise due care with respect to

his workplace. *See, e.g., Atlantic Coast Line Railroad v. Davis*, 279 U.S. 34, 36 (1929); *Foreman v. Texas & New Orleans Railroad*, 205 F.2d 79, 81 (5 Cir. 1953); *Robichaux v. Kerr McGee Oil Industries*, 317 F. Supp. 587, 592 (W.D. La. 1970). If an employee finds himself in an unsafe workplace, common sense suggests that he should notify his employer of the problem. *See Dennis v. Denver & Rio Grande Western Railroad*, 375 U.S. 208, 209-10 (1963); *White v. St. Louis-San Francisco Railway*, 539 S.W.2d 565, 569 (Mo. Ct. App. 1976); 56 C.J.S. *Master and Servant* § 393 (1948 & Supp. 1983). Here, moreover, there was no evidence that Conway directed that the last piece of timber be cut on the platform or assured Crane and Fatone that all would be well, as in *Knierim v. Erie Lackawanna Railroad*, 424 F.2d 745, 747 (2 Cir. 1970). Although he surely acquiesced in what appears to have been a joint decision, nothing suggests that if Crane had made even a mild objection, it would have gone unheeded. Thus we do not agree with the district judge that a finding that anything over 5% of the fault was due to Crane would have been against the weight of the evidence.

Still we cannot say that there was "no basis in reason" for the judge to conclude that an assessment of 50% against Crane was too high.[5] Many cases under the FELA, 45 U.S.C. §§ 51 *et seq.*, and the Jones Act, 46 U.S.C. § 688, emphasize the primacy of an employer's

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5 There is a surprising dearth of authority, both under the FELA and generally, concerning the standards governing the determination of how much of the total negligence should be attributed to each negligent party. See Prosser, The Law of Torts § 67, at 437-38 (4th ed. 1971); V. Schwartz, Comparative Negligence § 17.1, at 276-77 (1974); Philbrick, *Loss Apportionment in Negligence Cases* (pt. 2), 99 U. Pa. L. Rev. 766, 801-06 (1951); Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465 (1953). See also Uniform Comparative Fault Act § 2 & comment (1977), 12 U.L.A. 38-40 (Supp. 1983). Much leeway is left to the trier of the facts.

duty to furnish employees with a safe place to work. *See, e.g., Bialey v. Central Vermont Railway*, 319 U.S. 350, 352-53 (1943); *Duncan v. St. Louis-San Francisco Railway*, 480 F.2d 79, 83 (8 Cir.), *cert. denied*, 414 U.S. 859 (1973); *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 223 (5 Cir. 1975) (Wisdom, J.); *Ragsdell v. Southern Pacific Transportation Co.*, 688 F.2d 1281, 1283 (9 Cir. 1982) (per curiam). The employer can draw on a wealth of experience and embody its teachings in rules, as was done here; the employee may well be facing the danger for the first time. Moreover, the employer often is responsible for the safety of several persons—as here notably for Walker—whereas the employee is responsible only for himself. The railroad committed numerous acts of negligence as compared to Crane's single one. Here, although Crane was not free to act in disregard of his own safety, the ultimate responsibility was Conway's. The foreman's willingness to permit the work to be done, apparently for no compelling reason, under what quite apparently were dangerous conditions, without taking any added precautions because of the noise created by the chain saw, could properly be deemed by the judge to have been a much more serious breach of duty than Crane's carelessness in going along with the change of workplace. Moreover, as developed by Dean Prosser, this similarity of language between negligence and contributory negligence tends to obscure that, in contrast to negligence,

> [c]ontributory negligence involves no duty, unless we are to be ingenious as to say that the plaintiff is under an obligation to protect the defendant against liability for the consequences of his own negligence.

The Law of Torts § 65, at 418 (4th ed. 1971) (footnote omitted). If Conrail had greater responsibilities than

Crane, as it did, the judge had a rational basis for thinking that an allocation of 50% of the total fault to him was "seriously erroneous". We thus cannot find that she abused her discretion by setting aside so much of the verdict as found that Crane's responsibility for the accident was equal to Conrail's.

We take a different view with respect to so much of the order as directed a new trial on the issue of damages. It was held in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), prior to adoption of the Federal Rules of Civil Procedure, that while at common law there was no practice of setting aside a verdict in part, the Seventh Amendment did not command adherence to that rule. "All of vital significance in trial by jury is that issues of fact be submitted for determination with such instruction and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law." *Id.* at 498. In consequence, "where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again." *Id.* at 499. Fed. R. Civ. P. 59(a) permits the grant of a new trial "on all or part of the issues", with the Notes of the Advisory Committee referring to the *Gasoline Products* decision.

The *Gasoline Products* case involved a claim by the plaintiff for breach of a license contract on which the jury had rendered an award in plaintiff's favor and a counterclaim by defendant for plaintiff's breach of a construction contract on which the jury had rendered a verdict in defendant's favor. The court of appeals, having ruled that there was an error in the charge with respect to damages on the counterclaim, limited the new trial to the deter-

mination of such damages. Although approving the refusal to grant a new trial with respect to plaintiff's claim, the Supreme Court held it was error to limit the new trial on the counterclaim to the issue of damages, since, although "[t]he verdict on the counterclaim may be taken to have established the existence of a contract and its breach", *id.*, there were many facts relating to the date of formation, terms and breach of the construction contract that the new jury would have to determine in order to make an intelligent award of damages. It was in this context that the Court said, in ordering a new trial as to both liability and damages on the counterclaim,

> Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice[,]

id. at 500, and concluded that

> [h]ere the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial[,]

id. The Court's concern was thus with the ability of the second jury to function under the limitation imposed by the court of appeals.

In *Rivera v. Farrell Lines, Inc.*, 474 F.2d 255, 259 n.5 (2 Cir.), *cert. denied*, 414 U.S. 822 (1973), an action under the Jones Act, which adopted the FELA principle with respect to comparative negligence, Judge Oakes, writing for this court, suggested a procedure of special interrogatories which was designed to insulate the various elements

in a recovery under that statute so as to facilitate the grant of partial new trials where error was found only with respect to one. The clear implication was that if such a procedure was followed, as was done here, error with respect to one issue will ordinarily not constitute reason to retry an issue that was separately determined. Drawing upon this teaching, we held in *Akermanis v. Sea-Land Service, Inc.*, *supra*, 688 F.2d at 906, that where special interrogatories had independently established the amount of plaintiff's damages, a trial judge's rejection of a verdict that plaintiff was only 4% responsible for an accident did not require a new trial on damages if the judge did not deem this necessary. Responding to defendant's contention "that any retrial should include redetermination of damages since the jury might have perceived comparative negligence as closely related to damages and might have allowed its determination of damages to be influenced by its erroneous finding of relative fault," *id.* (footnote omitted), we said that "when a jury arrives at its decision by detailed special verdicts, enabling a trial or a reviewing court to be reasonably certain that an erroneous verdict was reached independent of another verdict, a partial retrial may be in order", *id.*, and that "[a]lthough it is possible that the jury's special verdicts encompassed some undisclosed compromise, absent obvious inconsistencies we will not presume that the jury's findings represent anything other than good faith responses to the quesions presented," *id. Akermanis* thus establishes that if Chief Judge Motley had limited the new trial to the issue of comparative negligence, we would have upheld her. Our question is the somewhat different one whether, recognizing the discretion accorded to the district judge with respect to the grant of new trials, we should reverse when she did not.

The memorandum opinion of the district judge, which we have quoted above, casts little light on why a retrial of the damages issue was thought to be necessary. Clearly a jury retrying only the issue of comparative fault would not have faced the insuperable difficulties that would have confronted a jury attempting to try only the issue of damages in the *Gasoline Products* case—the point to which the cautionary language of that opinion was addressed. The judge did not find that the verdict with respect to damages at the first trial was against the weight of the evidence, and there would have been no basis for doing so. There is nothing to suggest that it was a compromise between jurors who believed that Crane was entitled to larger damages and others who believed that Conrail was not liable at all, as in the classic cases of *Simmons v. Fish*, 210 Mass. 563, 97 N.E. 102 (1912), and *Schuerholz v. Roach*, 58 F.2d 32 (4 Cir. 1932), also cited in the Advisory Committee's Note to Fed. R. Civ. P. 59, where juries had rendered verdicts of a few hundred dollars for the loss of an eye and the defendant was held to be entitled to a new trial on the issue of liability as well as on that of damages because of the obvious compromise character of the verdict. Here the evidence as to Conrail's liability was overwhelming and the verdict on damages was in line with the testimony of its expert, the only economic witness at the first trial. However much we may sympathize with the plaintiff, it is of no legal significance that the first jury might well have awarded higher damages if it had heard the evidence on that subject offered by plaintiff at the second trial. Neither is there any reason to believe that the substantial damage award represented some undisclosed impermissible compromise wherein jurors wishing to make a larger damage award were sustained by a threat that unless they yielded other jurors

would insist on an even higher percentage for Crane's comparative fault, rather than "good faith responses to the questions presented", see *Akermanis*, *supra*, 688 F.2d at 906. The trouble with the verdict at the first trial lay not in the amount of damages awarded, which was well related to the evidence, but in the jury's having cut plaintiff's recovery in half by finding that Crane's contributory fault amounted to 50% rather than a lesser percentage or even to none. A "misconception of the law and the evidence" with respect to the degree of contributory fault would not affect the jury's determination of the damages resulting from Crane's untimely death. *Akermanis* constitutes authority, if such were needed, against the proposition that simply because the jury could rationally be found to have erred seriously with respect to one issue, the judge should infer that it also erred seriously with respect to the other. The judge's suggestion of "taint" could well have been influenced by her belief that a finding of more than 5% comparative fault would have been irrational—a view with which, for reasons stated above, we do not agree.

In sum, we find no adequate basis in the record or in the judge's memorandum opinion for her directing the issue of damages to be retried simply because the jury had assessed too large a degree of fault against Crane. Recognizing the deference owed to the trial judge because of her superior opportunity to get the "feel of the case", *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947), something more is required to upset a verdict than the conclusory language with respect to "taint" used by the district judge. While we must guard against usurping the trial court's prerogative with respect to seriously erroneous jury verdicts, we must be equally diligent in protecting the jury's function. Direction of a new trial on

an issue determined by a jury without the articulation of a sufficient basis for such action effects, as Chief Judge Biggs said in the *Lind* case, *supra*, 278 F.2d at 90, "a denigration of the jury sytem and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts."

Plaintiff contends that a new trial with respect to damages was required in any event because of an error in the charge. This was that the court did not instruct the jury to determine the discount rate based on comparing interest rates with inflation, as is allegedly required by *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30 (2 Cir. 1980), *cert. denied*, 451 U.S. 971 (1981), and *Jones & Laughlin Steel Corp. v. Pfeifer*, 103 S. Ct. 2541 (1983). However, as both these decisions make clear, *Doca*, 634 F.2d at 34, *Jones & Laughlin*, 103 S. Ct. at 2556, below-market discount rates (currently those which are the products of comparing interest rates with inflation) are appropriate only when the calculation of future wages has not made an upward adjustment for inflation.[6] Here defendant's expert had made an allowance for inflation with respect to Crane's future earnings, estimating, *e.g.*, that Crane would be receiving a salary of $93,000 a year in 2005. Indeed, plaintiff's hypothetical adjustment of Dr. Staller's analysis, which was presented to and considered by the jury, was based on annual wage increases exceeding those which yielded the inflated

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6 The court suggested use of the 2% discount figure sanctioned by *Doca* to the relatively small amounts representing the loss of services Crane would have performed for his family and for nurture of his son. In fact, as the judge observed, plaintiff had presented no evidence as to the amounts of these items, and thus the jury was at sea with respect to calculating an appropriate discount. Under these circumstances, we find no fault with the court's suggestion.

$93,000 figure. Thus, the evidence of lost future earnings presented to the jury, under either the plaintiff's or defendant's model, may be seen as taking inflation into account.[7] Under these circumstances, we do not find reversible error in the court's instruction.

The judgment is therefore reversed, with directions to enter judgment in the amount of $425,000 determined to be plaintiff's damages by the jury at the first trial, with no deduction to be made for any fault of Crane's. No costs.

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7 Plaintiff also contends that the court's instruction allowed the jury to reach a mischievous result if it based the award on non-inflated future earnings and then used a high discount rate which did not account for inflation. The court concluded that the testimony and evidence at trial adequately informed the jury that inflation should be taken into account if it chose to make an independent calculation of future earnings. App. at 716d. Although we do not necessarily share the district judge's confidence that jurors should be presumed capable of extracting proper methods of discount rate calculations from the testimony and evidence at trial, we nevertheless conclude that the judge's later suggestion that the jury use the 2% below-market discount rate if it decided to venture beyond the figures presented by the parties sufficiently ensured that the jury's determination followed accepted practices.

MEMORANDUM OPINION OF MOTLEY, C.J.,
GRANTING PETITIONER A NEW TRIAL.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - X

CAROL A. CRANE, individually and as Administratrix of the goods, chattels and credits which were of PETER A. CRANE, Deceased,

Plaintiff,

-against-

CONSOLIDATED RAIL CORPORATION,

Defendant.

81 Civ. 3795 (CBM)

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APPEARANCES

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MOTLEY, C.J.

This wrongful death action was brought pursuant to the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq*. A jury trial was held from August 23, 1982 to August 27, 1982, resulting in a verdict for plaintiff. The jury found plaintiff's damages to be $425,000, but reduced the award to $212,500 upon a finding of fifty per cent contributory negligence by the deceased. The matter is currently before the court upon plaintiff's motion for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50, or, in the alternative, for a new trial pursuant to Fed. R. Civ. P. 59. For the reasons set forth below, the court finds that a new trial should be granted as to the issue of contributory negligence only.

Facts.

The decedent, Peter Crane, was an

employee of defendant Consolidated Rail Corporation (Conrail). On December 10, 1980, Crane and several others were sent to repair a platform used by passengers to cross the train tracks at the Scarborough Station in Westchester County, New York. One man was sent down the track with an air horn to act as watchman and warn the others of approaching trains. Crane, his foreman, and two others commenced the repairs, using a motorized chain saw to cut the wood needed. Apparently, the noise of the chain saw was sufficiently loud to drown out the watchman's air horn, and during the course of the repairs, a train operated by an employee of Conrail struck and killed Crane. Crane was 33 years old. He was survived by his widow, plaintiff herein, and a four year-old son.

No evidence was presented as to who decided that the wood to be used should be

sawed in the track area, rather than outside the fence separating the tracks from the rest of the station area. Crane carried the saw to the track area, and was operating it immediately prior to his death. His foreman was present at the scene.

The safety rules promulgated by defendant include a provision which states:

> Foremen are responsible for a safe operation and must exercise every reasonable precaution to protect men in their charge. They will assign gang watchmen when and where necessary as well as advance watchmen when needed.

Rule 3204. Safety rule 3206 further provides that a gang watchman must be equipped with both a warning whistle and a white disc to be held overhead at arm's length, as a visual warning of approaching trains. (Rule 3210.) The watchman assigned to warn Crane and his fellow workers was not equipped with a disc.

Discussion.

Plaintiff moves for judgment notwithstanding the verdict as to contributory negligence, pursuant to Fed. R. Civ. P. 50. However, plaintiff's failure to move for a directed verdict at the close of the evidence [1/] forecloses this avenue of relief. *See* 5A Moore's Federal Practice ¶50.08.

In the alternative, plaintiff moves for a new trial pursuant to Fed. R. Civ. P. 59, on the ground that the finding of contributory negligence was against the weight of the evidence. "Unlike a motion for judgment notwithstanding the verdict, a new trial motion may be granted even if there is substantial evidence to support the verdict . . . The trial judge is free to weight the evidence himself and need not view it in the light most favorable to the

verdict winner." *Bevevino v. Saydjari*, 574 F.2d 676, 683-84 (2d Cir. 1978). In *Bevevino*, this circuit expressly approved the standard set forth in 6A Moore's Federal Practice ¶ 59.08[5]:

> The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not.

Bevevino, *supra*, at 684, *quoting* 6A Moore's Federal Practice at 59-160, 59-161 (footnotes omitted).

In the instant action it is quite clear that the jury has reached a seriously erroneous result. The finding of fifty per cent contributory negligence is simply not supported by the evidence in this case. Indeed, this court initially ruled that it would not even charge the jury on the issue of contributory negligence, in as much as it saw no evidence to support such a finding. However, upon reconsideration, the court included the charge on the theory that it was conceivable, however unlikely, that the jury might find that Crane should have protested the unsafe conditions and did not. Such a finding, however, could in no way support a verdict of fifty per cent contributory negligence, nor, indeed, anything over five per cent. As this court charged the jury, "the decedent is held to the exercise of that degree of reasonable care which a railroad employee

with his experience would have used under the circumstances." At the time of his death, Crane was working with two other railroad employees. Crane exercised the same degree of care as did they. If Crane was negligent, so were his co-workers. His foreman, charged with the safety of the crew, was plainly at least as negligent as the others, and in the court's view, far more so. The decision as to where the crew would work was properly the foreman's. The foreman sent a man with neither the proper equipment nor any training to perform the duties of watchman. Further, he failed to advise the dispatcher that his men would be working on the track. Overall, his behavior fell shockingly below the reasonable man standard. Since this negligence is attributable to Conrail, it is inconceivable that a jury which properly understood the law it was to apply could have found Crane

to have been as negligent as all the other workers combined. Accordingly, to allow the contributory negligence finding to stand would be a miscarriage of justice.

To allow the jury's damage finding to stand and simply award the full amount of damages found would be the equivalent to permitting additur, a practice prohibited by the Supreme Court in *Dimick v. Scheidt*, 293 U.S. 474 (1936). See *Akermanis v. Sea-Land Service, Inc.*, No. 81-7833 (2d Cir. Sept. 14, 1982). A new trial on the issue of contributory negligence is therefore necessary.

Plaintiff also seeks a new trial on the issue of damages. Where, as here, the jury has rendered a detailed special verdict, the court may properly separate the issues of contributory negligence and damages for retrial purposes. *Akermanis*, slip op. at 4815-16. However, on the facts here,

the court believes that the finding of damages and that of contributory negligence are sufficiently related that the jury's damage finding may also have been tainted by the misconception of the law and the evidence.

Accordingly, a new trial will be held on the issues of damages and contributory negligence.

Dated: New York, New York
January , 1983

CONSTANCE BAKER MOTLEY
Chief Judge

Rule 50

Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative.

If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court

concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Rule 59

New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted

a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.